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Wang Chih Tsang & Ors v Cheng Pi Chun

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02-(NCVC)(A)-1084–06 OF 2016
LIM YEE LAN, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
13 DECEMBER 2017

C *Companies and Corporations — Winding up — Petition — Allegation of oppression by majority shareholders against minority shareholder — Whether there was misappropriation of funds — Whether there was exclusion of minority shareholder from managing company — Whether there was autocratic management of company — Whether there was denial of access to financial position of company — Companies Act 1965 s 181*

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The first appellant and the respondent were Taiwanese. They were husband and wife from 1984–2009. The second appellant was a company owned by the family of the first appellant. The third appellant was a company acquired after the first appellant obtained RM1.2m from his family through a family agreement entered into between the first appellant and his family members. The first appellant was the managing director of the second and third appellants while the respondent was a shareholder and a director of the third appellant. The respondent's cause of action against the appellants at the High Court was based on oppression under s 181 of the Companies Act 1965 ('the Act'). The respondent claimed that she had contributed to the third appellant by transferring RM1.3m from Taiwan to Malaysia for the purchase of five pieces of land bought by the third appellant. The alleged oppressive conducts were: (a) misappropriation of respondent's and third appellant's fund; (b) exclusion of the respondent by the first appellant from managing the company and autocratic management in the company; (c) attempt by the first appellant in selling the third appellant's assets; and (d) denial of access to the financial position of the company. The judicial commissioner ('the JC') found that the respondent had successfully proved her case on a balance of probabilities. The JC made the order which allowed the respondent's petition to wind up the third appellant and also to appoint an independent liquidator to investigate into the first and second appellants conduct in the affairs of the third appellant and to commence appropriate action against the first and second appellants. Hence the present appeal.

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Held, setting aside High Court order and allowing the appeal with costs of RM40,000 subject to allocator:

(1) There was no finding by the JC on the alleged misappropriation of the respondent's fund. The JC erred when he found that it was safe to infer that such transaction was done without the knowledge of the respondent. Being a co-signatory to the cheques issued by the third appellant, surely her signatures would be required before any payment was made in the alleged transactions (see para 18).

(2) There were four directors of the third respondent but only the first respondent was named in the petition. Where was the evidence that the majority was oppressive towards her? Just because the first appellant allegedly had full control in the decision-making of the third appellant, the fact, if true, was not enough to show oppression. The respondent's contention that she was excluded by the first appellant in managing the third appellant and that the third appellant was managed autocratically was insufficient to prove her claim of oppression under s 181 of the Act (see paras 28–29).

(3) If it was true that the respondent had been denied access to the record books of the third appellant for many years even though she had been a shareholder since 2006, why did she not take action then? As a shareholder and as a director, did it not occur to her why was she not called for any meeting for many years? Why did she keep quiet? There was obviously inordinate delay on the part of the respondent in filing the petition only in 2014 and this delay could not be condoned (see paras 23–24).

(4) The court was empowered to make only one order and the JC had chosen para (e) of s 181(2) of the Act ie to wind up the third respondent. However, the JC went further by ordering the investigation into the conduct of the first and second appellants in the affairs of the third appellant and to commence appropriate action against them. This was beyond the scope of s 181. This was further compounded by the fact that the respondent was not a member or shareholder of the second appellant and therefore had no interest whatsoever in the second appellant. Neither was the first or second appellant a member or shareholder of the third appellant. The JC erred when he made the order (see para 35).

[Bahasa Malaysia summary

Perayu pertama dan responden adalah warganegara Taiwan. Mereka adalah suami isteri dari 1984–2009. Perayu kedua adalah syarikat yang dimiliki oleh keluarga perayu pertama. Perayu ketiga adalah syarikat yang diambil alih selepas perayu pertama menerima RM1.2 juta daripada keluarganya melalui perjanjian keluarga yang dimasuki antara perayu pertama dan ahli-ahli keluarganya. Perayu pertama adalah pengarah urusan perayu kedua dan ketiga manakala responden adalah pemegang saham dan pengarah perayu ketiga. Kausa tindakan responden terhadap perayu-perayu di Mahkamah Tinggi

A adalah berasaskan penindasan di bawah s 181 Akta Syarikat 1965 ('Akta'). Responden mendakwa dia telah menyumbang kepada perayu ketiga dengan memindah milik RM1.3 juta dari Taiwan ke Malaysia bagi pembelian lima bidang tanah yang dibeli oleh perayu ketiga. Tindakan-tindakan yang dikatakan menindas adalah: (a) salah guna dana responden dan perayu ketiga; B (b) pengetepian responden oleh perayu pertama dalam menguruskan syarikat dan pengurusan autokratik dalam syarikat; (c) percubaan oleh perayu pertama dalam menjual aset perayu ketiga; dan (d) penafian akses terhadap kedudukan kewangan syarikat. Pesuruhjaya kehakiman ('PK') mendapati responden berjaya membuktikan kesnya atas imbangan kebarangkalian. PK C mengeluarkan perintah yang membenarkan petisyen responden untuk menggulung perayu ketiga dan juga melantik seorang pelikuidasi bebas untuk menyiasat tindakan perayu pertama dan ketiga dalam hal ehwal perayu ketiga dan memulakan tindakan yang sepatutnya terhadap perayu pertama dan kedua. Oleh itu rayuan ini.

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Diputuskan, mengetepikan perintah Mahkamah Tinggi dan membenarkan rayuan dengan kos sebanyak RM40,000 tertakluk kepada alokator:

(1) Tiada apa-apa dapatan oleh PK tentang dakwaan salah guna dana responden. PK terkhilaf apabila beliau mendapati bahawa selamat untuk E menyimpulkan bahawa transaksi ini dibuat tanpa pengetahuan responden. Sebagai seorang penanda tangan bersama cek-cek yang dikeluarkan oleh perayu ketiga, pastinya tanda tangan responden diperlukan sebelum apa-apa bayaran dibuat dalam transaksi tersebut F (lihat perenggan 18).

(2) Terdapat empat orang pengarah dalam responden ketiga tetapi hanya responden pertama yang dinamakan dalam petisyen. Di manakah keterangan bahawa majoriti menindas responden? Hanya kerana perayu pertama didakwa mempunyai kawalan penuh dalam buatan keputusan G perayu ketiga, fakta ini, jika pun benar, tidak cukup untuk menunjukkan penindasan. Hujahan responden bahawa dia diketepikan oleh perayu pertama dalam menguruskan perayu ketiga dan bahawa perayu ketiga diuruskan secara autokratik tidak cukup untuk membuktikan dakwaan penindasan di bawah s 181 Akta (lihat perenggan 28–29).

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(3) Jika benar bahawa responden telah dinafikan akses terhadap buku-buku rekod perayu ketiga bertahun lamanya walaupun dia adalah pemegang saham hingga 2006, kenapa dia tidak mengambil apa-apa tindakan ketika itu? Sebagai pemegang saham dan pengarah, tidakkah dia terfikir I kenapa dia tidak dipanggil bertahun lamanya? Mengapakah dia berdiam. Jelas terdapat kelewatan terlampau oleh responden dalam memfailkan petisyen hanya pada 2014 dan kelewatan ini tidak boleh dimaafkan (lihat perenggan 23–24).

(4) Mahkamah berkuasa membuat satu perintah sahaja dan PK memilih

perenggan (e) s 181(2) Akta untuk menggulung responden ketiga. Walau bagaimanapun, PK seterusnya mengarahkan siasatan terhadap tindakan perayu pertama dan kedua dalam hal ehwal perayu ketiga dan memulakan tindakan yang sepatutnya terhadap mereka. Ini melangkaui skop s 181. Ini ditambah lagi dengan fakta bahawa responden bukan ahli atau pemegang saham perayu kedua dan dengan itu tiada apa-apa kepentingan dalam perayu kedua. Perayu pertama dan kedua juga bukan ahli atau pemegang saham perayu ketiga. PK terkhilaf dalam mengeluarkan perintah tersebut (lihat perenggan 35).]

Notes

For cases on petition, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1709–1878.

Cases referred to

Five Minute Car Wash Service Ltd, Re [1966] 1 All ER 242, Ch D (refd)
Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re [1978] 2 MLJ 227, PC (refd)
Lin Kai Wing & Anor v Lin Kai Lam & Ors [2016] 4 MLJ 372; [2016] 10 CLJ 77, CA (refd)
Mascon Rinota Sdn Bhd & Ors v Rinota Construction Sdn Bhd [2016] 4 MLJ 400; [2016] 4 CLJ 854, CA (refd)
Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd & Ors [2010] 5 MLJ 342; [2010] 4 CLJ 897, CA (refd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1991] 3 MLJ 325, SC (refd)
Taman Sungai Dua Development Sdn Bhd (previously known as Supershine (M) Sdn Bhd) v Goh Boon Kim [1997] 2 MLJ 526, CA (refd)
Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd [2014] 3 MLJ 1; [2014] 2 CLJ 1, FC (distd)

Legislation referred to

Companies Act 1965 s 181, 181(1)(a), (2), (2)(d), (2)(e)

Appeal from: Originating Petition No SDK-26NCvC-2/9 of 2014 (HC) (High Court, Sandakan)

Serena Liew Chun Yean (Serena Liew & Assoc) for the appellants.
Ken Yong (Ken Yong & Co) for the respondent.

Zaleha Yusof JCA:

[1] The first appellant and the respondent are Taiwanese. They were husband and wife from 1984–2009.

[2] The second appellant is a company owned by the family of the first appellant, incorporated by the first appellant when he came to Sabah in 2001. The third appellant is a company, acquired after the first appellant obtained RM1.2m from his family through a family agreement entered into between the first appellant and his family members. The first appellant is the managing director of the second and third appellants while the respondent is a shareholder and a director of the third appellant.

[3] Before us, the appellants are appealing against the order of the High Court at Sandakan dated 5 May 2016 ('the said order') which allowed the respondent's petition to wind up the third appellant and also to appoint an independent liquidator to investigate into the first and second appellants' conduct in the affairs of the third appellant and to commence appropriate action against the first and second appellants.

PRELIMINARY OBJECTION ('PO')

[4] At the outset of the hearing of the appeal before us, learned counsel for the respondent had raised a PO that by virtue of the said order, the third appellant is a wound up company and therefore has no locus standi to initiate this appeal without first obtaining sanction from the official receiver ('OR'). Learned counsel cited the decision of the Federal Court in *Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd* [2014] 3 MLJ 1; [2014] 2 CLJ 1 wherein the Federal Court had allowed the PO raised by the respondent and refused leave to appeal on the ground that the sanction by the OR given on 19 August 2013 had no retrospective effect, hence the application for leave filed prior to the issuance of the sanction was invalid.

[5] Learned counsel for the appellants argued that *Winstech*'s case, can be distinguished as Winstech's leave application did not arise from the decision of the winding up court judge in granting the winding up order. It arose from a civil suit filed by Winstech where Winstech's claim was dismissed and the defendant's counter claim was allowed. Unlike the instant appeal, the suit in *Winstech*'s case, was not a continuation of the winding up proceedings.

[6] Having heard the arguments on the PO, we unanimously held that the PO raised was without merit. We respectfully agreed with learned counsel for the appellants that *Winstech*'s case, is distinguishable from the instant appeal as the appeal herein pertains to the order which had resulted in the company being wound up. The appellants herein were aggrieved with the winding up order made against the third appellant. In *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325 Hashim Yeop A Sani CJ (Malaya), delivering the judgment of the Supreme Court had, inter alia, at p 326 stated the following:

However, in our view, Mr Loh (counsel for the respondent) was not with respect, correct if he said that the company could not appeal against the winding up order. It is provided quite clearly in s 253(2) of the Act, that, subject to the rules, an appeal from any order or decision made or given in the winding up of a company shall lie in the same manner and subject to the same condition as an appeal from any order or decision of the court in cases within its ordinary jurisdiction. Therefore under that provision, an appeal can be made to this court against an order for the winding up of a company.

[7] At p 327, His Lordship further stated:

After a winding-up order is made, generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding up order is wrong and to appeal against the order ...

[8] The Court of Appeal in *Taman Sungai Dua Development Sdn Bhd (previously known as Supershine (M) Sdn Bhd) v Goh Boon Kim* [1997] 2 MLJ 526 had, inter alia, held:

(2) ... Further, it is common ground that notwithstanding the appointment of a provisional liquidator, the board still his residuary power, for example, it can instruct solicitor and counsel to oppose the current petition and, *if a winding up order is made, to appeal against that order* ... (Emphasis added.)

[9] Therefore we were of the view that where a company is appealing against a winding up order made against it as in this instance, no sanction of the official receiver is required to be obtained before it can be allowed to file or proceed with the appeal. On that footing, we dismissed the PO.

THE APPEAL

[10] The respondent's cause of action against the appellant in the originating petition dated 11 September 2014 ('the petition') was based on oppression under s 181 of the Companies Act 1965. The respondent claimed that she had contributed to the third appellant by transferring RM1.3m from Taiwan to Malaysia for the purchase of five pieces of land bought by the third appellant. The alleged oppressive conducts by the appellants to the respondent as summarised by the learned JC who heard the petition were:

(i) Misappropriation of the respondent's and the third appellant's fund;

(ii) Exclusion of the respondent by the first appellant from managing the company and autocratic management in the company;

(iii) Attempt by the first appellant in selling the third appellant's assets;

(iv) Denial of access for the financial position of the company.

[11] The learned JC had found that the respondent had successfully proved her case an a balance of probability and made the impugned order which was the fourth prayer in the petition.

[12] The issue before us was whether the learned JC was right in making the said order based on s 181 of the Companies Act 1965. The said s 181 reads as follows:

> Remedy in cases of an oppression
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> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:
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> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
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> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
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> (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may:
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> (a) direct of prohibit any act or cancel or vary any transaction or resolution;
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> (b) regulate the conduct of the affairs of the company in future;
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> (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
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> (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
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> (e) provide that the company be wound up.
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> (3) Where an order that the company be wound up is made pursuant to paragraph (2)(e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.
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> (4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company

concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order.

Penalty: One thousand ringgit. Default penalty.

[13] The Privy Council in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 at p 233 stated as follows:

Winding up is specifically mentioned on s 181(2)(e) of the Companies Act as a head of relief which the court may grant. No limiting conditions are imposed, so that the granting of it is in the discretion of the court. In exercising this discretion, the court will have in mind the drastic character of this remedy, if sought to be applied to a company which is a going concern; it will take into account (a statement which is not exhaustive) the gravity of the case made out under s 181(1); the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; the interests of other members of the company not involved in the proceedings.

[14] The Court of Appeal in *Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd & Ors* [2010] 5 MLJ 342 at p 350; [2010] 4 CLJ 897 at p 906 had explained:

The protection accorded under s 181 is only given to the following persons, namely:

(a) Member or shareholder of a company;

(b) Holder of a debenture of a company; and

(c) In the case of a declared company under Part IX, the Minister (charged with responsibility for companies).

Other than those persons stated above, no other persons can claim any protection or relief under s 181, not even a director, executive or employee of a company.

[15] Hence, it is clear that what is envisaged by s 181 is that the act of oppression must relate to the petitioner's status as a member or shareholder of the company.

[16] Back to the finding of the learned JC, on the alleged oppression, we shall deal with them as follows.

Misappropriation of the respondent's and the third appellant's fund

[17] The learned JC had in respect of the first alleged oppression found at para 49 of His Lordship's grounds of decision the following:

> Upon the inspection on the said statement of accounts it was discovered that the funds of the third respondent had been misused for the benefit of the second respondent in the following transactions:
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> (i) payments to commercial servicing agency for the levy charges on one Tasarus Tanel, who work for the second respondent;
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> (ii) purchase of fertiliser from Teck Guan Trading Sdn Bhd for the second respondent;
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> (iii) payment of windfall tax amounting to RM6,860.78 to the Customer Department Sabah for the second respondent.

[18] There was no finding by the learned JC on the alleged misappropriation of the respondent's RM1.3m. So, the question is, would these alleged actions amount to oppression? It must be borne in mind that these alleged oppressive conduct were committed between 2005–2006. There was no dispute that the respondent and the first appellant were still husband and wife then and that the respondent was the co-signatory of the third appellant's account. There was also evidence as shown at pp 66–72 of the core bundle that the respondent had even issued cheques to herself in 2006. Hence we were of the view that the learned JC erred when he found that 'it is safe to infer that such transaction was done without the knowledge of the petitioner'. Being a co-signatory to the cheques issued by the third appellant, surely her signatures would be required before any payment was made in the alleged transactions.

[19] The English Court in *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242 had held that:

> unwise, inefficient and careless management does not constitute oppressive conduct. The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being out voted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs whether on grounds relating to policy or to efficiency however well founded amounts to oppression if there is no unfair prejudice.

[20] We therefore found the respondent's complaint on this point to be without merit.

Exclusion of the respondent by the first appellant from managing the company and auto crate management in the company

[21] On this, the learned JC in his ground of decision had stated the following:

(a) It must be noted that the petitioner from 2006 is one of the shareholders of the third respondent holding 16% shares and also one of its directors. It was shown during the trial that the petitioner, as a shareholder, had been denied access to the record books of the third respondent. Her request for such access was denied by the first respondent as well as the company's auditor, prompting her to file an Originating Summons No SDK-24–36/6 of 2013 against the company. A consent order was then entered and it was then that the petitioner was allowed access to part of the documents of the third respondent.

(b) In my opinion the filing of the originating summons by the petitioner shows that the first respondent had been preventing the petitioner from the management of the company. There is no reason for the first respondent to deny such access to the petitioner considering the fact that she is also one of the directors of the third respondent. Such refusal has put the petitioner in a difficult position which resulted in the filing of the originating summons which is unnecessary if the first respondent was to act reasonably towards another director of the company.

(c) This refusal is further compounded by the first respondent act in preventing the petitioner from attending the Board of Director Meeting of the third respondent as well as its Annual General Meeting held on 20th day of July 2014.

(d) It was proven during the trial that DW5, the company secretary of the third defendant had issued a notice of the AGM to be convened on 20th day of July 2014 one of the agenda of AGM was to receive and adopt the audited account of the third defendant for year ended 31st day of March 2007 until 31st day of March 2013. It was also DW5 evidence that the notice of the Board of Directors Meeting would be faxed to all directors. However he did not fax the said notice to the petitioner because he does not have her fax number.

(e) During cross-examination DW5 told the court the notice of the Board of Directors Meeting on 20th day of July 2014 purportedly sent to the petitioner did not bear the address of the petitioner. Likewise the notice of the AGM on 20th day of July 2014 purportedly sent to the petitioner also does not bear the address of the petitioner.

(f) It was admitted by DW5 that he could not contact the petitioner for the purpose of the service of the said notices and a lady by the name of Chong Li Mee had accepted service of the notice on behalf of the petitioner.

[22] Further, the learned JC said:

(a) Having examined the evidence I am of the opinion that it is safe to conclude that the first respondent had been in control of the said company. He gave instructions to the company secretary and run the company as if it is a private own business. He was also responsible in denying the petitioner access to the record of the company forcing her to file an originating summons seeking for redress and it was only after the

filing of the said originating summons that the petitioner was given limited access to the statement of accounts of the third respondent.

(b) The record of the meetings on 28th day of September 2007 and 10th day of December 2007 were not properly kept and there is a possibility that the signature of one of the directors were forged.

(c) However, most importantly is the fact that the notice of the meeting on 20th day of July 2014 was not properly served on the petitioner.

[23] First thing that came to our minds from the above excerpt, if it was true that the respondent had been denied access to the record books of the third appellant for many years even though she had been a shareholder since 2006, why did she not take action then? In para 40 of the petition as shown at p 40 of the core bundle, the respondent alleged that except for the AGM fixed on 28 September 2007, which she had attended, she had never attended any other general meeting or board meeting of the third appellant. As a shareholder and as a director, did it not occur to her why was she not called for any meeting for many years. Why did she keep quiet?

[24] Hence, we agree with learned counsel for the appellant that if this allegation is true, there was obviously inordinate delay on the part of the respondent in filing the petition only in 2014 and this delay cannot be condoned. This court in *Mascon Rinota Sdn Bhd & Ors v Rinota Construction Sdn Bhd* [2016] 4 MLJ 400; [2016] 4 CLJ 854 had held:

(1) The question of delay in filing the petition was of paramount importance in any consideration of the exercise of the court's discretion under s 181 of the CA. Herein, this petition was only filed in 2006, ie, ten years after those matters complained of had first occurred. Acting without expediency to protect or further one's rights when an alleged breach or violation of such right arose amounted to acquiescence, meaning acceptance or consent to that situation. The court should deny relief to an interested party who had sat on his rights and accepted tacitly such practices or decisions adopted by a company in its business affairs over time, but who now wished to advance matters related to or arising therefrom as a grievance for relief under s 181 of the CA.

[25] In *Lin Kai Wing & Anor v Lin Kai Lam & Ors* [2016] 4 MLJ 372; [2016] 10 CLJ 77 this court held, inter alia:

The fact that the respondents had possession of the accounts pursuant to the oppression petition as of 2010 and yet failed to lodge a police report alleging fraud or seeking recovery until some two years later suggested that the respondents' claim lacked legitimacy. Further, litigation in relation to matters involving the business of KMT or KMTSB ought to be litigated in one suit. Filing several suits gave rise to the possibility of duplicity in findings and not to mention, *res judicata*. The trial judge failed to appreciate that a plea of fraud was not simply made out by pointing to the undisputed fact of withdrawals from KMT or KMTSB. It requires considerably

more to establish fraud. Even by applying the lower standard of a balance of probabilities, the plea of fraud was simply not made out. A

[26] Similarly in this instance, it took about eight years for the respondent to present her petition despite her being a co-signatory of the third appellant's cheques and despite her purported exclusion from attending the third appellant's meeting. This in our view is sufficient to deny her from the relief she sought for. B

[27] We also noted that the learned JC was persuaded by the fact that the respondent was 'prevented' from attending the Board of Directors meeting. As alluded to earlier, s 181 concerns only with the petitioner's position as a member or shareholder of the company, and not her status as a director. The petitioner must show both that the conduct of the *majority* is 'oppressive' and that it affects her in her capacity as a shareholder. See *Soh Jiun Jen*. Hence we opined that the learned JC erred when he took into consideration the respondent's status as a director to allow her the protection of s 181. C D

[28] Further s 181(1)(a) clearly says 'that the affairs of the company is being conducted or the powers of the directors are being exercised'. There are four directors of the third respondent but only the first respondent was named in the petition. Where is the evidence that the *majority* is oppressive towards her? Just because the first appellant allegedly had full control in the decision making of the third appellant, that fact if true, in our view, is not enough to show oppression. See *Re Kong Thai Sawmill (Miri) Sdn Bhd*. E F

[29] We therefore opined that the respondent's contention that she was excluded by the first appellant in managing the third respondent and that the third appellant was managed autocratically was insufficient to prove her claim of oppression under s 181. G

Attempt by first appellant in selling one third appellant's assets; and

Denial of access from the financial position of the company H

[30] In paras 44–45 of his ground of decision the learned JC stated the following:

> With regard to the sale of the third respondent's landed properties, the first respondent (DW4) admitted in his evidence that he wanted to disposed off the said properties and had advertised the intended sale in the *Merdeka Daily Newspaper* on 22nd day of August 2013. In particular the land belong to the third respondent are: I
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> (i) A piece of land measuring 14.62 acres situated at Sg Batang, Mile 10, Sandakan;

(ii) A combination of 3 pieces of land measuring 15 acres situated at Labuk Road, Mile 15, Sandakan;

(iii) A piece of land situated at Mile 34 Sandakan measuring 15.35 acres.

It must be noted that the intended sale was not known to the petitioner or the Board of Director of the third respondent. Upon knowing this purported attempt to sell the plaintiff filed an application for injunction under Case No SDK-24–54/8 of 2013 to restrain the third defendant from selling the land. The restraining order was granted by this court on 25th day of October 2013.

[31] Hence the learned JC was fully aware that there was a restraining order dated 25 October 2013 granted against the third appellant and its directors, restraining them from entering into any sale and purchase or transferring the said properties of the third appellant.

[32] On top of that there was also a consent order dated 13 September 2013 between the respondent and the third appellant, allowing the respondent to inspect all documents and accounts of the third respondent.

[33] In the circumstances, we fully agreed with learned counsel for the appellants that these two complaints of the respondent are now res judicata. As found by this court in *Lin Kai Wing*, 'filing several suits gave rise to the possibility of duplicity in findings and not to mention, res judicata'. The complaints had already been dealt with in those two other suits and we did not think that the respondent could raise them again here in order to gain protection under s 181.

THE ORDER

[34] Under sub-s 181(2) of the Companies Act 1965, once oppression is established, the court may make the following order:

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the of affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holder of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

[35] With the word 'or' at the end of para (d) of sub-s 181(2), it is clear in our view, that those paragraphs must be read disjunctively. The court is empowered

to make only one order and the learned JC in this instant appeal had chosen para (e) ie to wind up the third respondent. However the learned JC had gone further by ordering the investigation into the conduct of the first and second appellants in the affairs of the third appellant and to commence appropriate action against them. This in our view is definitely beyond the scope of s 181. This is further compounded by the fact that the respondent is not a member or shareholder of the second appellant and therefore has no interest whatsoever in the second appellant. Neither was the first or second appellant a member or shareholder of the third appellant at the time of the filing of the petition.

Thus it was our view that the learned JC erred when he made the order under s 181 against the first and second appellants.

CONCLUSION

[36] In the circumstances and for the reasons stated, we were of the unanimous view that this was a fit and appropriate case for appellate intervention. We were of the view that the learned JC erred in holding that oppression had been established based on the grounds raised by the respondent. We therefore set aside the High Court order and allowed the appeal with costs of RM40,000 here and below subject to payment of allocator fee. Deposit was ordered to be refunded.

High Court order set aside and appeal allowed with costs of RM40,000 subject to allocator.

Reported by Afiq Mohamad Noor